Supreme Court, U.S.
FILED
SEP 21 2010
OFFICE OF THE CLERK

No. 08-1314

In the Supreme Court of the United States

DELBERT WILLIAMSON, ET AL.,

Petitioners,

V.

MAZDA MOTOR OF AMERICA, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 (Safety Act), directs the Secretary of Transportation to "establish by order motor vehicle safety standards." Federal Motor Vehicle Safety Standard (FMVSS) 208, 49 C.F.R. § 571.208 (1987), regulates occupant crash protection, including seatbelt requirements. From 1967 through the time period at issue in this case, FMVSS 208 gave automobile manufacturers the option of installing a lap-only or lap/shoulder belt in the rear inboard seating positions of vehicles. In 1984, the National Highway Traffic Safety Administration (NHTSA) specifically rejected a proposal that FMVSS 208 be amended to require lap/shoulder belts in all rear seats, and in 1989 the agency reaffirmed that decision as to rear center/aisle seats. NHTSA's decision to give manufacturers the freedom to choose either a lap-only or lap/shoulder seatbelt in rear center/aisle seats was the product of a deliberate policy judgment intended to further the objectives of the Act, including safety, technical feasibility, cost, and public acceptance.

The question presented is whether the Safety Act or FMVSS 208 preempts state tort claims that an automobile manufactured in 1993 was defectively designed because it contained a lap belt—rather than a lap/shoulder belt—in a rear center/aisle seat.

RULE 29.6 STATEMENT

Mazda Motor of America, Inc. dba Mazda North American Operations is wholly owned by Mazda Motor Corporation. Ford Motor Company is the only publicly held company that owns 10% or more of the issued stock of Mazda Motor Corporation.

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INTRODUCTION

This Court held in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), that the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 (Safety Act) and Federal Motor Vehicle Safety Standard (FMVSS) 208 preempt state lawsuits seeking to impose tort liability on automobile manufacturers for not installing airbags. In so holding, the Court emphasized that the National Highway Traffic Safety Administration (NHTSA) had made a deliberate policy judgment based on the objectives of the Safety Act that manufacturers should be free to choose among "different passive restraint devices" in complying with FMVSS 208. 529 U.S. at 875. A "state tort law" rule requiring manufacturers to install airbags would have contravened that deliberate policy judgment and thus, the Court held, would "stand as an 'obstacle' to the accomplishment of [the federal] objective." *Id.* at 886.

From 1967 through the time period at issue in this case, FMVSS 208 also gave automobile manufacturers the option to install either lap-only (Type 1) or lap/shoulder (Type 2) seatbelts in rear center and aisle seats of vehicles. In 1984, NHTSA rejected a proposal that it require Type 2 belts in all rear seats, primarily because it concluded that mandating Type 2 belts would make children *less* safe. And in 1989, the agency refused to mandate Type 2 belts in rear center/aisle seats based on safety and other concerns, including the fact that installing Type 2 belts in those seats could make it more difficult for rear passengers to enter or exit the vehicle, impede drivers' rearward vision, and divert agency and industry resources from higher value safety initiatives. As NHTSA's own chief counsel confirmed in 1994--a year after the vehicle in

this case was manufactured—the agency determined that manufacturers were in "the best position" to determine when installation of Type 2 belts in those seats was appropriate for their vehicles. *Infra* at 28.

Every appellate court that has considered the issue has concluded that the seatbelt option established by FMVSS 208 reflects the same kind of deliberate policy judgment as the airbag rule held preemptive in *Geier*. Indeed, as Judge Wood observed in a similar vein in *Hurley v. Motor Coach Industries, Inc.*, 222 F.3d 377, 381 (7th Cir. 2000), *cert. denied*, 531 U.S. 1148 (2001), "it is hard to see any significant difference between the two situations." Faced with that reality, petitioners ground their case on a legal theory straight out of the *dissent* in *Geier*—arguing for a strong "presumption against preemption" even though this Court has already held that the Safety Act imposes no "special burden" on conflict preemption claims, *Geier*, 529 U.S. at 872, and instead adopts "ordinary pre-emption principles," *id.* at 874. Petitioners' *amici* are more candid and simply say that *Geier* should be "reconsider[ed]." Attorneys Information Exchange Group Br.22; *accord* State of Illinois Br.25; Public Justice Br.1-2. But *Geier* is firmly grounded in this Court's precedents and compels the conclusion that petitioners' state tort claims are preempted.

To avoid that conclusion, petitioners repeatedly mischaracterize respondents' position as arguing that "mere compliance with an option ... is sufficient to preempt state common law." Pet.Br.26-27. As the United States recognizes, however, respondents' position—like the decision below—in fact rests on the premise that FMVSS 208 not only offers manufacturers an option but embodies a policy

judgment that manufacturers should be free to choose between Type 1 and Type 2 belts in rear center/aisle seats. U.S.Br.13-14. Just as the Court held was true for the analogous option in *Geier*, a state tort rule requiring manufacturers to install Type 2 belts in those seats would contravene that deliberate policy judgment and frustrate the federal objectives it serves.

Unlike petitioners, the United States largely accepts the *Geier* framework and contends that "ordinary principles of conflict preemption" displace state law that would interfere with a federal regulation that seeks to ensure that parties "remain free to choose among [specified] options." U.S.Br.11, 8. We agree with that formulation of the key legal inquiry. Like petitioners, however, the government ultimately fails to account for critical aspects of the administrative record. Moreover, the government's position is inherently suspect. The government stood idle for almost a decade while one appellate court after another held that FMVSS 208 *preempts* seatbelt-related claims like petitioners'. The common-sense conclusion is that the government believed that those decisions were correct then—and only recently changed its view due to "shifting political tides." Public Justice Br.19-20. That newfound position does not merit any deference, and it is just as unpersuasive as petitioners' position.

STATEMENT OF THE CASE

A. Statutory And Regulatory Scheme

Congress passed the Safety Act in 1966 "[t]o provide for a coordinated national safety program and establishment of safety standards for motor vehicles." Pub. L. No. 89-563, 80 Stat. 718, 718 (1966). The Act reflected Congress's judgment that "primary responsibility for regulating the national automotive

manufacturing industry must fall squarely upon the Federal Government," in part because "[t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry" made it essential that safety standards "be uniform throughout the country." S. Rep. No. 89-1301, at 4, 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2712, 2720.

In a section of the Act entitled "Preemption," Congress provided that whenever a FMVSS is in effect, "a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the [federal] standard." 49 U.S.C. § 30103(b)(1). The Act separately states that "[c]ompliance with a motor vehicle safety standard ... does not exempt a person from liability at common law." 49 U.S.C. § 30103(e). In *Geier*, this Court held that this "saving clause" "does *not* bar the ordinary working of conflict pre-emption principles." 529 U.S. at 869. State tort claims that would "frustrate the accomplishment of a federal objective" under the Safety Act are thus preempted. *Id.* at 873.

The Safety Act directs the Secretary of Transportation to establish federal motor vehicle safety standards which "shall be practicable, [and] meet the need for motor vehicle safety." 49 U.S.C. § 30111(a). The "practicability" requirement compels the Secretary to consider factors "including technological ability to achieve the goal of a particular standard as well as ... economic factors." H.R. Rep. No. 89-1776, at 16 (1966). The Secretary has delegated the responsibility to promulgate FMVSSs to the Administrator of NHTSA. 49 C.F.R. § 1.50(a).

Most FMVSSs establish "performance standards," S. Rep. No. 89-1301, at 5, *reprinted in* 1966 U.S.C.C.A.N. at 2713-14; JA.211, and typically merely establish a federal floor. *See, e.g.*, 23 C.F.R. § 255.21 S4.1.2 (1968) (establishing minimum percent of windshield area that must be wiped by vehicle's windshield wiping system). But some FMVSSs establish *design* standards that mandate the installation of particular safety features, establishing both a floor and a ceiling. *See, e.g., id.* § 255.21 S3 (1968) ("A windshield defrosting and defogging system shall be provided."). And occasionally, NHTSA finds that the Act's purposes are served best by leaving manufacturers free to choose among specified design options. The rule at issue in this case –like the rule in *Geier*—fits in this last category.[1]

B. NHTSA's Deliberate Decision To Give Manufacturers The Freedom To Choose A Type 1 Or Type 2 Belt For Rear Center And Aisle Seats

For most Americans today buckling up with a lap/shoulder belt is as familiar as the automatic window. But in fact, like the automatic window, the presence of a lap/shoulder belt in every seating position is only a relatively recent development. The story of NHTSA's rulemaking governing the installation of

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[1] Petitioners suggest (Br.28 n.9) that the design option in this case is not uncommon, but they struggle to identify actual analogs. In fact, almost all the examples they cite are not design options at all, but merely allow manufacturers to demonstrate safety through various testing requirements, which themselves are more akin to classic performance standards. *See, e.g.*, 49 C.F.R. § 571.108 at S6.4.3 (requiring manufacturers to certify compliance of each lamp function by one of two specified means).

Type 2 belts in particular seating positions is critical to the proper resolution of this case.

1. As initially promulgated in 1967, FMVSS 208 required manufacturers to install Type 2 seatbelts in *front* outboard seating positions, but provided manufacturers with the option to install "a Type 1 *or* a Type 2 seat belt assembly" in each other passenger car seat position. 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967) (emphasis added). Although the agency did not publish any explanation with that rule, the difference in treatment based on seat location surely reflected both safety and cost considerations. For example, NHTSA well understood that rear seats frequently were used by children, and that the child seats of that era were generally more compatible with Type 1 belts. 35 Fed. Reg. 14,941, 14,942 (Sept. 25, 1970); *see also* 49 Fed. Reg. 15,241, 15,241 (Apr. 18, 1984) (explaining that "most child restraints are designed to be used only with lap belts" and that use of "Type 2 belts in the rear outboard seating positions would make the installation of the conventional child safety seat much less convenient than with the current belt").

NHTSA also appreciated that mandating Type 2 belts could depress overall seatbelt usage. *E.g.*, 35 Fed. Reg. at 14,942. Throughout the 1970s, NHTSA struggled with low public acceptance of seatbelts, and by 1981 seatbelt use plummeted to only *11%*. 46 Fed. Reg. 2064, 2064 (Jan. 8, 1981). Shoulder belts were a chief source of complaints, "contribut[ing] substantially to the public's complaints of lack of comfort and fit." 41 Fed. Reg. 54,961, 54,962 (Dec. 16, 1976); *see also* 46 Fed. Reg. at 2064. Type 2 belts also suppressed seatbelt usage by women, due to "greater problems of

chest fit and pressure" caused by shoulder straps. 44 Fed. Reg. 77,210, 77,212 (Dec. 31, 1979).

2. In the 1980s, NHTSA considered—and rejected in pertinent part—two petitions that specifically asked the agency to mandate Type 2 belts in rear seats.

a. In 1982, individuals associated with a highway safety group filed a petition urging NHTSA to "require the installation of Type 2 safety belts ... in the rear outboard seating positions of passenger cars," claiming that doing so would enhance child safety and offer "added protection" for adults as well. 49 Fed. Reg. at 15,241. The agency rejected that petition in 1984, largely for child safety reasons. *See id.* at 15,241-42. NHTSA explained that child restraint systems and booster seats were safer for children when attached with tethers rather than Type 2 belts. *Id.* at 15,241. NHTSA also found that "young children['s] chest cavities are very flexible and vulnerable to chest belt loads," and that "[a] Type 2 belt system would create these chest belt loads." *Id.* at 15,242. While Type 2 belts "might give some added degree of protection to adults," NHTSA found that any such benefits did not outweigh the costs to child safety. *Id.*

b. In 1987, the agency received a petition from a child safety association asking NHTSA to require the installation of lap/shoulder belts in all rear seating positions, prompting the agency to "reexamine" this issue from 1987-1991. After receiving nearly three dozen comments on its advance rulemaking notice, and over 70 more comments on its notice of proposed rulemaking, 54 Fed. Reg. 46,257, 46,258 (Nov. 2, 1989), NHTSA decided to mandate Type 2 belts in rear *outboard* positions. But it chose to maintain the status

quo option for rear center/aisle seats, for safety and technical reasons discussed below. *Id.* at 46,258.

The decision to mandate Type 2 belts for rear *outboard* seats largely reflected a changed cost-benefit calculus from 1984. "Safety belt use in rear seats had increased eightfold [from 2 to 16%]" from 1981 to 1987, increasing the numbers of adults who might benefit from rear shoulder belts. 54 Fed. Reg. 25,275, 25,276 (June 14, 1989). Moreover, the costs of requiring Type 2 belts in rear *outboard* seats had nearly vanished. While NHTSA had worried that the rule's estimated cost of $140 million annually, *id.*, was "extremely disproportionate to the possible safety benefits," 52 Fed. Reg. 22,818, 22,819 (June 16, 1987), it discovered that "nearly every 1990 model year passenger car would have been voluntarily equipped with rear outboard seat lap/shoulder belts" anyway, reducing the cost to about $790,000, 54 Fed. Reg. at 25,276.[2]

3. NHTSA's decision to preserve FMVSS 208's express option allowing manufacturers to install Type 1 or Type 2 belts in rear center and aisle seats was grounded on the objectives of the Safety Act.

Child Safety

By requiring Type 2 belts in rear outboard seats, but allowing Type 1 belts in rear center and aisle seats, the agency accommodated competing child safety considerations. By 1989, NHTSA concluded that "child restraint production had shifted away from those that were designed to have a tether" (akin to what later

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[2] Although petitioners point to a report issued by the National Transportation Safety Board ("NTSB") questioning the safety of lap only belts, Pet.Br.5-6, NHTSA itself thoroughly repudiated this report and found that "lap belts are effective in preventing death and reducing injuries." 52 Fed. Reg. at 22,820.

would become known as the "LATCH" system) to designs that could be anchored by a Type 2 belt, and also that booster seats for older children would be safer if used with shoulder belts. 53 Fed. Reg. 47,982, 47,983-84 (Nov. 29, 1988).[3] But tethered child seats remained common. And actual public acceptance of booster seats was low. *See id.* at 47,988. Even years later, a 1994 NHTSA survey indicated that only *0.8%* of children aged 6-12 sat in a child or booster seat, as compared to 55.9% who sat in seatbelts.[4]

Moreover, as NHTSA explained, "[m]any of these children are not yet big enough to use the shoulder belt in the rear seat ... since it could pass over their neck or face." 53 Fed. Reg. at 47,988. For the vast majority of older children who did *not* use booster seats, NHTSA instructed parents to disable the shoulder portion of a Type 2 belt, essentially converting it into a make-shift *Type 1* belt (a practice NHTSA later determined was unsafe, *see infra* at n.11). *See id.* at 47,988-89.

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[3] The agency long retained its view, however, that tethers better promoted child safety than Type 2 belts. NHTSA's view was vindicated over time. Citing widespread problems of child safety seat misuse and the need for greater safety, NHTSA mandated the installation of designated anchorages to support tethers in 1999. *See generally* 64 Fed. Reg. 10,786 (Mar. 5, 1999)

[4] Kathleen D. Klinich et al., NHTSA, DOT HS-808 248, *Study of Older Child Restraint/Booster Seat Fit and NASS Injury Analysis* at 6 (Nov. 1994) ("NASS Study"). This was especially troubling since NHTSA found that children should not wear Type 2 belts until they reached 148cm (4'10") and 37 kg (81 pounds), the median size of an 11-year-old. *Id.* at Abstract; Robert J. Kuczmarski et al., National Center for Health Statistics, *2000 CDC Growth Charts* at 27-30 (May 2002), *available at* http://www.cdc.gov/nchs/data/series/sr_11/sr11_246.pdf.

As petitioners note, NHTSA expected the rule to have "no positive or negative effects on children riding in most designs of car seats and children that are too small to use shoulder belts." Pet.Br.8. But this was only because NHTSA continued to recommend that those children be placed in the *rear center* seat or in rear outboard seats with disabled shoulder belts. *See, e.g.*, 56 Fed. Reg. 3064, 3064 (Jan. 28, 1991) ("[E]ven as more rear outboard seating positions of vehicles on the road have shoulder restraints, the safest position for the child restraint (the center rear position) will not be equipped with shoulder restraints."). Due in part to concerns about "misuse" of the "shoulder portion of the lap/shoulder combination," NHTSA did not even permit the *testing* of child seats using shoulder belts until 1994. 58 Fed. Reg. 46,928, 46,929 (Sept. 3, 1993); 59 Fed. Reg. 37,167, 37,167 (July 21, 1994).[5]

Aisle Seat Safety

NHTSA also found "merit" in distinct design and safety concerns with the use of Type 2 belts in rear center/*aisle* seats—the seat involved in this case. 54 Fed. Reg. at 46,258. As NHTSA explained, "[t]his exclusion of aisleway seats from the rear seat lap/belt requirement reflected NHTSA's determination that the shoulder belt stretched across the aisleway of a vehicle could cause entry and exit problems for occupants of seating positions to the rear of the aisleway seating position." 55 Fed. Reg. 30,914, 30,915

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[5] During the rulemaking, NHTSA considered distinct concerns regarding the compatibility of child restraint systems with emergency locking retractor belts (ELRs). As the government notes, however, these concerns were equally applicable to Type 1 and Type 2 belts, and did not impact the agency's decision-making regarding rear center/aisle seats. U.S.Br.26.

(July 30, 1990). In addition, "[t]his exclusion was added ... because attaching belt anchorages to the side of the vehicle could cause a lap/shoulder belt to fit its user poorly." 69 Fed. Reg. 70,904, 70,905 (Dec. 8, 2004).

NHTSA encouraged manufacturers to install Type 2 belts in these seats if they could overcome the technical challenges and safety risks for their own vehicles. 54 Fed. Reg. at 46,258. By intentionally leaving manufacturers free to install Type 1 belts, however, NHTSA recognized that the challenges were not easy to overcome, and that a premature mandate could create safety problems. This caution was validated; over a decade later, some manufacturers still struggled to develop an integrated Type 2 belt system for this seat. *See* 69 Fed. Reg. at 70,909. This finally led the agency to acknowledge that "integrated belt designs are not an optimal design for all types of seats," and to allow manufacturers to install detachable, non-integrated shoulder belts in aisle seats to work around any remaining technical problems. *Id.* at 70,908.

Technical Challenges, Costs, Public Acceptance, And Additional Safety Implications

The agency also found that requiring manufacturers to install Type 2 belts in rear center and aisle seats would prove not only technically difficult but excessively costly, and therefore would be harmful to its broader safety objectives. While the agency found a Type 2-only rule for rear *outboard* seats to be substantially less costly than expected, this was not the case for rear center and aisle seats. Type 2 belts were 67% more expensive to install in rear center versus outboard seats. 52 Fed. Reg. at 22,820. The agency estimated that a Type 2-only rule for rear center seats would cost over $150 million (or over *100 times* the final

cost of the outboard rule)—but produce marginal safety benefits in passenger cars and produce "no reduction in fatalities" in multi-passenger vehicles (MPVs) like the minivan in this case. *Id.* at 22,819-20.

NHTSA also anticipated distinct technical challenges associated with the installation of Type 2 belts in this seating position that created safety as well as public acceptance concerns. In particular, the agency concluded that installation of Type 2 belts in rear center belts might cause "disruptions of the vehicle's cargo carrying area or impede the driver's rearward vision." 53 Fed. Reg. at 47,984. And the agency ultimately determined that "[w]hether or not those difficulties could be overcome, there would be small safety benefits and substantially greater costs" if Type 2 belts were required. *Id.*

As NHTSA explained at the outset of its rulemaking, such a result would interfere with its long-term safety objectives. "Requiring significant industry and agency resources to be spent for relatively little safety gain *can result in a lost opportunity to better improve vehicle safety through other means*, such as improved frontal or side impact protection." 52 Fed. Reg. at 22,819 (emphasis added). Moreover, NHTSA had learned from a series of failed safety rulemakings during the previous two decades that expensive regulations yielding minimal benefits caused "significant long run harm to the safety program," by "poisoning ... popular sentiment towards efforts to improve occupant restraint systems in the future." 46 Fed. Reg. 53,419, 53,424 (Oct. 29, 1981).

4. In 2002, Congress enacted Public Law No. 107-318, 116 Stat. 702 (2002) (Anton's Law), to promote the use of belt-positioning booster seats—an advanced

child safety device that for the first time utilized the shoulder component of Type 2 belts, and which NHTSA first facilitated the introduction of in 1994. 59 Fed. Reg. at 37,168. Because Congress intended that "[c]hildren who have outgrown their child safety seats should ride in a belt-positioning booster seat until an adult seat belt fits properly," 49 U.S.C. § 30127 note § 2(3), it directed NHTSA to initiate a rulemaking to require lap/shoulder belts in each rear seat, with limited exceptions, *id.* at § 5(a)(1). NHTSA responded in 2004 with a rule requiring integrated Type 2 belts in nearly all rear seats. 69 Fed. Reg. at 70,904.

The passage of Anton's Law does not suggest that the child safety concerns impacting NHTSA's 1989 rulemaking were unfounded. As late as 1996, for instance, NHTSA found that "[child] [s]afety seats were used correctly more often with a vehicle that had a ... lap belt rather than a ... lap-shoulder belt." NHTSA, *Observed Patterns of Misuse of Child Safety Seats* at 1 (Sept. 1996), *available at* http://www.nhtsa.gov/people/outreach/traftech/pub/tt133.pdf. Anton's Law was facilitated by two developments *after* 1993. In 1994, NHTSA revised its child safety rules to facilitate the introduction of belt-positioning booster seats—the first booster seats compatible with shoulder belts. In addition, NHTSA circumvented problems of child seat/Type 2 belt misuse and compatibility by adopting a new approach for anchoring child restraints *independent of seatbelts* altogether—a lower anchor, LATCH tether system that it required in new vehicles starting in 1999. *See* 64 Fed. Reg. at 10,788; 49 C.F.R. §§ 571.213, 571.225.

C. This Action

This litigation stems from a fatal accident in Utah involving a 1993 Mazda MPV Minivan ("MPV") driven by Delbert Williamson, in which his wife Thanh and seven-year-old daughter Alexa were passengers. The MPV had seven seats: two front seats, two middle-row seats (a bench with an outboard seat and center/aisle seat), and three back-row seats. Five seats had Type 2 belts. Two seats—the third-row center seat and the middle-row aisle seat—had Type 1 belts. At the time of the crash, Thanh was in the middle-row center/aisle seat (with a Type 1 belt); Alexa was in the middle-row outboard seat (with a Type 2 belt). Pet.App.3a.

Petitioners filed a Second Amendment Complaint in California state court on May 5, 2005. As relevant here, petitioners alleged that Mazda's installation of a Type 1—rather than Type 2—belt in the "middle seat of the middle row" of the MPV amounted to various torts under California law, including negligence and strict products liability. JA.44 ¶ 15; Pet.Br.17. On a motion for judgment on the pleadings, and on subsequent demurrer, the trial court concluded that the claims at issue were preempted by FMVSS 208. JA.194, 355-56.[6] The California Court of Appeal agreed, holding that "FMVSS 208 preempts common law actions alleging a manufacturer chose the wrong seatbelt option" in cases like this. Pet.App.24a.

The Court of Appeal explained, that "'[a] review of the regulatory and rule making history of FMVSS 208 supports the conclusion that the NHTSA's decision to allow car manufacturers the option to install either lap-

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[6] The trial court allowed other claims to go forward, but petitioners chose to forgo those claims. U.S.Br.5-6.

only or lap/shoulder belts in the rear center seating position of passenger vehicles was deliberate, and [that] the agency identified specific policy reasons for its decision.'" Pet.App.16a (quoting *Carden v. General Motors Corp.*, 509 F.3d 227, 231 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 2911 (2008)). The court rejected petitioners' argument that the "policy judgments" underlying the option at issue in *Geier* were somehow unique for purposes of the conflict-preemption analysis, and held that *Geier* compelled the conclusion that petitioners' claims were preempted. Pet.App.12a-18a.

The California Supreme Court denied review.

SUMMARY OF ARGUMENT

The Court of Appeal correctly held that petitioners' state law claims are preempted by FMVSS 208.

I. In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), this Court held that the Safety Act incorporates "ordinary principles of pre-emption" and that, as a result, state law tort claims that would stand "'as an obstacle to the accomplishment and execution of'" the federal objectives embodied in safety standards under the Act are preempted. *Id.* at 886, 881 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). As the government acknowledges, under ordinary preemption principles, a federal safety standard that deliberately leaves manufacturers "free to choose" (U.S.Br.8) among various options in order to achieve policy objectives under the Safety Act preempts state law tort claims that seek to narrow those options.

II. Petitioners' state law tort claims are preempted because the regulatory record confirms that NHTSA intended to leave manufacturers free to choose a Type 1 or Type 2 belt for the rear center/aisle seating position at issue, in order to serve largely the

same federal objectives as the rule in *Geier*. NHTSA's rule was based on safety concerns tied to the most likely occupants of rear center and aisle seats—children; unique safety and technological concerns presented by the installation of Type 2 belts in rear *aisle* seats; and the fact that installation of Type 2 belts in rear center/aisle seats was extremely costly but offered at most marginal safety benefits for adults. A state law rule mandating Type 2 belts in those seats would stand as an obstacle to the accomplishment of those federal objectives—creating added dangers for many children, forcing manufacturers to install Type 2 belts before they could make the structural changes necessary to avoid safety problems (like obstructing access to the back row) or do so without an enormously disproportionate cost, and risking the public backlash that comes with forcing overly costly measures.

Claims like petitioners' certainly were preempted before 1989, when the agency had consistently *refused* to mandate Type 2 belts in rear seats for, in large part, safety reasons. Petitioners do not argue otherwise. Instead, petitioners argue that claims like theirs were allowed "[b]y 1993," Pet.Br.22, because, "[b]y *that time*, there were technologically feasible ways of installing Type 2 seatbelts in aisle seating positions," Pet.Br.41 (emphasis added). But preemption that flits in and out with asserted safety or technological developments, or with subsequent safety or technical setbacks, is unheard of. Moreover, NHTSA vested *manufacturers*, not juries, with the discretion to decide when the technical barriers to safe installation of Type 2 belts in rear aisle seats had been surmounted for their vehicles. In 1994—a year after the vehicle in this case was made—NHTSA's chief counsel reiterated that

manufacturers are in the "best position" to determine when Type 2 belts are safe and feasible for those seats. That pronouncement alone refutes the argument that allowing juries in 50 states to mandate Type 2 belts *as they saw fit* was consistent with federal objectives.

Petitioners and the government err in arguing that this Court should simply ignore large parts of the administrative record and limit its review *solely* to the 1989 rulemaking. As in *Geier*, the preemption inquiry must be based on the *history* of FMVSS 208, not an isolated moment in regulatory time. Nor is there any basis to ignore the fact that NHTSA recognized that, at least as of 1989, the cost of mandating Type 2 belts in all rear seats would vastly exceed the benefits—squandering economic resources that could produce far greater safety benefits if spent another way. This Court has refused to treat cost-benefit concerns as illegitimate or second-class considerations under statutes far less explicit about the role of cost-benefit analysis than the Safety Act. *E.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009). And there is no basis for excluding cost-benefit considerations from the preemption analysis under the Safety Act.

Here, as in *Geier*, the regulatory record "is clear enough" that the government's view is beside the point. 529 U.S. at 886. But the government's position is inherently suspect in any event. Notwithstanding the high-profile nature of the issue, the government did not voice any objection while one appellate court after another held that claims like petitioners' were preempted over the course of the decade following *Geier*. The natural conclusion is that the government thought those decisions were correct then and only recently had a change of heart due to "shifting political

tides." Public Justice Br.19-20. Such a political about-face is not entitled to any weight. Nor is the government's *post hoc* account of agency action that occurred more than a decade ago persuasive.

III. Petitioners ask this Court to put manufacturers in an impossible position. Manufacturers must be able to take at face value NHTSA's resolution of contentious safety issues involving difficult tradeoffs, including when, as here, NHTSA decides to further federal objectives by granting manufacturers the option to install different equipment types. Indeed, if this lawsuit is not preempted, then presumably neither is a lawsuit based on the premise that a *Type 1* belt should have been installed in a rear center/aisle seat—for example, because a passenger in the back row had difficulty exiting a vehicle following a crash. And petitioners' extraordinary suggestion that the possibility of massive retroactive liability should rest on an indeterminate, *post hoc* judgment about when a particular design option became sufficiently feasible or safe to unleash state tort law actions only makes matters worse. Congress could not possibly have intended to subject the nation's automobile industry to such an arbitrary and penal liability regime.

ARGUMENT

I. IF NHTSA MEANT MANUFACTURERS TO BE FREE TO CHOOSE AMONG DESIGNS TO FURTHER FEDERAL OBJECTIVES, STATE RULES NEGATING THAT CHOICE ARE PREEMPTED

1. The Supremacy Clause of the Constitution (Art. VI, cl. 2) provides that federal law "shall be the supreme Law of the Land." Under settled law

spanning nearly the life of the Republic, state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted. *Hines*, 312 U.S. at 67; *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (state laws which "interfere with, or are contrary to the laws of Congress," are invalid) (Marshall, C.J.).[7] In *Geier*, this Court affirmed that "ordinary pre-emption principles" apply with full force under the Safety Act. 529 U.S. at 874. Those principles establish the proper framework for analyzing the question presented here.

2. *Geier* concerned the 1984 version of FMVSS 208 as it related to passive restraint devices. The Court considered the Safety Act's express preemption provision in tandem with its saving clause, and held that the saving clause "does *not* bar the ordinary working of conflict pre-emption principles." *Id.* at 869. The Court explained that "[n]othing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations," and

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[7] *See also, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981); *Perez v. Campbell*, 402 U.S. 637, 649 52 (1971); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Savage v. Jones*, 225 U.S. 501, 533 (1912). Petitioners' *amici* level a sweeping attack on the well-settled doctrine of conflict preemption. American Ass'n for Justice Br.13; Public Justice Br.5, 27; Constitutional Accountability Center Br.3. The Court rejected a similar effort in *Geier* to drive a "legal wedge" between different conflict-preemption principles. 529 U.S. at 873. Particularly given that petitioners have not asked this Court to reconsider *Geier*, there is no basis to entertain that attack here.

concluded that the Act does not "'save' all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards." *Id.* at 869-70.

This Court also recognized that it would be very nearly absurd for Congress to preserve state law actions that would frustrate the federal regulatory scheme—and refused to interpret the statute that way absent more clear direction from Congress. An "argument [that] would permit common-law actions that 'actually conflict' with federal regulations ... would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect," and would cause the federal law "to defeat its own objectives, or potentially, as the Court has put it before, to 'destroy itself.'" *Id.* at 872 (citation omitted).

The Court then applied ordinary conflict preemption principles and held that a state law all-airbag rule would "actually conflict[] with FMVSS 208." *Id.* at 874. The Court focused on the fact that the agency "deliberately provided the manufacturer with a range of choices among passive restraint devices" in order to "lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance—all of which would promote FMVSS 208's safety objectives." *Id.* at 875. In addition, the Court emphasized that the agency "had *rejected* a proposed FMVSS 208 'all airbag' standard." *Id.* at 879. "Because the rule of law for which petitioners contend would have stood as an obstacle to the accomplishment and execution of [those] important means-related federal objectives," the Court

held that the state tort claim was preempted. *Id.* at 881 (internal quotation marks omitted).

3. While petitioners do not ask this Court to overrule *Geier*, a centerpiece of their argument is based on a proposition that comes straight out of the *dissent* in *Geier*. Petitioners argue that preemption claims under the Safety Act must overcome a "strong presumption against preemption." Pet.Br.21; *see* Pet.Br.23-26. The *Geier* Court, however, specifically rejected the dissent's contention that parties claiming conflict preemption under the Safety Act bear a "special burden" in establishing preemption. 529 U.S. at 872. Instead, the Court held, *ordinary* conflict preemption principles apply—under which "one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict." *Id.* at 885.

Congress—which is presumed to be aware of this Court's decisions, *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580-81 (1978)—amended the Safety Act to address seatbelts just two years after *Geier* in enacting Anton's Law. But Congress did not amend the preemption provisions or suggest that it had any disagreement with *Geier*. Considerations of *stare decisis* are of course particularly strong in the statutory context, "where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).[8]

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[8] Petitioners similarly err in suggesting (Br.24) that this Court's decision in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), changed the ground rules recognized by *Geier* for evaluating preemption claims under the Safety Act. In *Wyeth*, this Court cited *Geier* with approval as an example of where "an agency regulation with the force of law can pre-empt conflicting state requirements," and distinguished *Geier* on the ground that there was "no such

Petitioners also level a more subtle but equally problematic attack on *Geier*. Seeking to strip the Court's decision of any precedential significance, they contend that *Geier* has "no relevance" here because it concerned passive restraint sections of FMVSS 208 adopted during a different rulemaking. Pet.Br.35; *see* Pet.Br.12-16, 21. Of course *Geier* does not explicitly dictate the outcome here, and of course the two rulemakings were different. But this Court usually does not issue decisions that are "good for" one "day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). And far from confining *Geier* to its precise facts, the Court has discussed *Geier* in cases even outside the Safety Act context. *E.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002); *Wyeth v. Levine*, 129 S. Ct. 1187, 1203 (2009).

As the government correctly recognizes, *Geier* establishes the legal framework for resolving this case. U.S.Br.10-12. And as explained below, the parallels between this case and *Geier* are striking—and thus controlling if *Geier* is accorded *stare decisis* effect.

4. This Court's decision in *Geier* was consistent with the government's position in several prior airbag cases. In those cases, the government repeatedly

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regulation" in *Wyeth*. *Id.* at 1200-01. The regulation at issue in this case, like the one in *Geier*, undeniably has the "force of law." Likewise, to the extent that *Wyeth* could be viewed as altering the "ordinary principles of pre-emption" (*Geier*, 529 U.S. at 886) that govern the Safety Act, there is no basis for importing any new preemption principles into the Safety Act years after it was enacted by Congress and interpreted by this Court in *Geier*. And, in any event, "[t]he presumption against preemption of state laws that can coexist harmoniously with federal law is quite different from a presumption in favor of preservation of state laws that conflict with federal law." U.S. *Geier* Br.18 n.13 (Nov. 8, 1999).

advised the Court that "holding a manufacturer liable for a design defect could interfere with the Secretary's efforts to achieve the statutory objective." U.S. *Wood v. General Motors Corp.* Br.11 (Oct. 31, 1989) (No. 89-46). In particular, "when Congress or an agency determines that certain activity must be permitted in order to further the purposes of federal law, state law that would forbid that behavior is preempted." U.S. *Geier* Br.26 (citing cases); *see also* U.S. *Geier* Br.16-17; U.S. *Freightliner* Br.24 (Dec. 13, 1994); U.S. *Wood* Br.8 ("state tort claims that put at risk a specific federal policy promoting motor vehicle safety" are preempted). The government likewise acknowledges in this case that "a conflict results" between federal and state law when an FMVSS provides manufacturers with several options and reflects a policy judgment by NHTSA "that the regulated parties must remain free to choose among those options." U.S.Br.8, 11, 18.

The government has also consistently taken the position that "the mere fact that manufacturers may comply with federal law by installing one of several types of [equipment] does not mean, *standing alone*, that a state tort law action ... is preempted." U.S. *Wood* Br.15 (emphasis added); *see* U.S. Invitation Br.16. Petitioners suggest that the Court of Appeal held—and that respondents maintain—that "mere compliance with an option ... is sufficient to preempt state common law." Pet.Br.26; *see* Pet.Br.27. As the government recognizes, however, that is not accurate. U.S.Br.13-14. The Court of Appeal's decision—like our position—is based on the fact that the choice that NHTSA explicitly gave manufacturers to install a Type 1 or Type 2 belt in the seating positions at issue

embodies a "policy judgment by NHTSA" that would be frustrated by actions like this one. U.S.Br.14.[9]

Thus, while we disagree with the conclusion that the government reaches—and believe it cannot be squared with the legal principles it has long recognized—we largely agree with its basic formulation of the legal inquiry. The key is whether NHTSA's decision to offer manufacturers the choice to install Type 1 or Type 2 belts in rear center/aisle seats was designed to ensure that manufacturers were "free to choose among those options," in order to advance the policy objectives of the Safety Act. U.S.Br.8.

II. PETITIONERS' STATE TORT CLAIMS ARE PREEMPTED BY FMVSS 208

Like every other federal and state appellate court that has addressed the issue, the Court of Appeal below correctly held that petitioners' state tort claims are just as preempted as the claims in *Geier*.

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[9] Petitioners similarly suggest (Br.21) that the decisions holding that suits like the instant one are preempted by FMVSS 208's seatbelt rule rest on an "options only" rationale. Not so. Those decisions are based on the correct conclusion that allowing such actions to proceed would pose an obstacle to the *policy determinations* underlying that rule. *See* Pet.App.16a-18a; *Carden.*, 509 F.3d at 230-31; *Griffith v. General Motors Corp.*, 303 F.3d 1276, 1282 (11th Cir. 2002), *cert. denied*, 538 U.S. 1023 (2003); *Hurley*, 222 F.3d at 383; *Roland v. General Motors Corp.*, 881 N.E.2d 722, 728-29 (Ind. Ct. App. 2008); *Heinricher v. Volvo Car Corp.*, 809 N.E.2d 1094, 1098 (Mass. App. Ct. 2004).

A. Petitioners' Theory Of The Case Overlooks Key Parts Of The Record And Is Based On An Unworkable Notion Of Preemption

In *Geier*, this Court considered "[t]he history of FMVSS 208" from 1967 to the 1984 version of the rule, in order to "explain why and how [the agency] sought [to achieve certain policy] objectives" in passing that rule in 1984. 529 U.S. at 875; *see id.* at 875-81. In this case, a central plank of petitioners' argument is that this Court should focus *solely* on the 1989 rulemaking proceeding. Pet.Br.22, 26. The government commits the same mistake. U.S.Br.24 (confining its analysis of child safety concerns to the 1989 rulemaking). But, as in *Geier*, the 1989 version of FMVSS 208 must be considered in light of the *history* of NHTSA's regulation of seatbelts, and not simply a moment in regulatory time. Indeed, to understand why NHTSA refused to alter the status quo in 1989 and require manufacturers to install Type 2 belts in the seating position at issue, one must appreciate what the status quo was—and the "why and how" (*Geier*, 529 U.S. at 875) of the agency's decision to adopt it.

As explained above, the original version of FMVSS 208 gave manufacturers the option to use Type 1 or Type 2 belts in *all* rear seating positions. Regulatory pronouncements over the next decade make clear that this policy choice was based on considerations of safety, technical feasibility, and cost. NHTSA understood that overall seatbelt usage was very low in rear seats, and that Type 2 belts suppressed seatbelt usage among many adults—particularly women. As this Court recognized in *Geier*, NHTSA also was sensitive to the ever present risk that over-aggressive regulation

would produce a public backlash against passenger restraints. *See* 529 U.S. at 879 (noting that refraining from imposing an all-airbag rule would help to build the "public confidence necessary to avoid another interlock-type fiasco") (citation omitted).

Those considerations supported leaving manufacturers free to choose what rear belt mix would best fit the design and passenger profile of a particular vehicle, and underscore that NHTSA was by no means indifferent to state tort theories effectively mandating Type 2 belts in all rear seating positions. NHTSA confirmed as much in 1984 when it specifically rejected (for the first time)—largely on child safety grounds—a proposal that the Type 1/Type 2 option should be eliminated for all rear seats. *Supra* at 7.

Neither petitioners nor the government deny that NHTSA deliberately gave manufacturers the freedom to install Type 1 or Type 2 seatbelts in rear center and aisle seats up to and through the agency's 1984 decision to preserve that option for child safety reasons. Petitioners and the government also do not deny that a state tort claim like this one would have been inconsistent with NHTSA's prior policy determinations, and thus preempted, if asserted in 1985 or even 1988. (If petitioners believe that such claims would not have been preempted then either, it only underscores how far they are asking this Court to go in disregarding the federal objectives of FMVSS 208.) Nevertheless, petitioners and the government ask this Court to put on blinders and decide this case without regard to anything that happened before 1989.

Petitioners assert that "[t]he agency's 1984 objectives with respect to passive restraints have *no relevance* to the 1989 rule governing Type 2 seatbelts

in rear seating positions." Pet.Br.22 (emphasis added). But NHTSA decided in 1989 *to preserve the status quo* for rear center and aisle seats. The 1989 rulemaking record concerning those inboard seats is discussed in the next section, but nothing the agency said in 1989 suggested a radical change in existing policy as to these seats, much less put manufacturers on notice that they suddenly were exposed to state tort claims that would, previously, have been preempted.

Furthermore, it is not even clear—under petitioners' and the government's view of the record—that federal preemption of actions like this one ended promptly in 1989. Petitioners assert that, "*[b]y 1998*, there were technologically feasible ways" to address the agency's prior concerns with mandating installation of Type 2 belts in rear center and aisle seats. Pet.Br.22 (emphasis added); *accord* Pet.Br.18, 41; *see* U.S.Br.28. But they never make a similar claim about 1989—or 1990-91. In other words, petitioners appear to advocate an analysis under which tort claims like theirs suddenly became consistent with federal policy—and *un*-preempted—sometime in the early 1990s, after being preempted for a quarter century, because *in their view* the significant technical and safety challenges that NHTSA identified in the decade or more leading up to the 1989 rulemaking, and in 1989 itself, had all been resolved. According to petitioners, "*[b]y that time*, there were technologically feasible ways of installing Type 2 seatbelts in aisle seating positions." Pet.Br.41 (emphasis added).

This is a truly remarkable theory of preemption, requiring manufacturers making critical design and investment decisions to get by "with the exercise of extraordinary intuition or with the aid of a psychic."

United States v. Chrysler, 158 F.3d 1350, 1357 (D.C. Cir. 1998) (holding that NHTSA failed to give constitutionally adequate notice of what is required by a FMVSS). But preemption that can come and go based on a claimed safety or technological development, or the subsequent discovery of a safety or technical limitation, is unprecedented. And the complete history of FMVSS 208 compels the conclusion that when NHTSA gave manufacturers the explicit option to use Type 1 or Type 2 belts—and then explicitly refused to require manufacturers to install Type 2 belts in rear center/aisle seats—it intended for manufacturers to retain the discretion to make either choice until *NHTSA itself* actually revoked the option.

Indeed, NHTSA's chief counsel confirmed in a letter a year *after* the vehicle in this case was manufactured that "[w]e believe the vehicle manufacturer is in the best position to balance, for its vehicles, the benefits associated with [the] extra protection [afforded by Type 2 belts] against any difficulties related to occupants entering and exiting the vehicle." Letter from Philip R. Recht, NHTSA Chief Counsel, to Roger Matoba (Dec. 28, 1994) ("1994 Chief Counsel Letter").[10] This letter was consistent with concerns that NHTSA had consistently stressed leading up to the 1989 rulemaking in refusing to *force* manufacturers to install Type 2 belts in rear center/aisle seats. And the letter underscores that NHTSA "'affirmatively and deliberately'" (U.S.Br.12 (quoting *Geier*, 529 U.S. at 878) sought to ensure that

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[10] This letter—which responded to an individual who claimed that installing Type 2 belts in rear aisle seats was unsafe—is available at http://isearch.nhtsa.gov/files/10243.html.

manufacturers had the option to install a Type 1 or Type 2 belt in the seating position at issue.

B. The History Of FMVSS 208 Reflects A Deliberate Judgment To Preserve A Manufacturer Choice For Rear Center And Aisle Seats

NHTSA's 1989 decision to preserve the express option to install a Type 1 or Type 2 belt in rear center/aisle seats was the product of a deliberate policy judgment based largely on the same set of federal objectives underlying the analogous option at issue in *Geier*—namely, safety, technical issues, costs, and public acceptance. 529 U.S. at 878-79.

Child Safety

Petitioners argue that "child safety had *nothing* to do with NHTSA's 1989 decision not to mandate Type 2 seatbelts for center and aisle seating positions." Pet.Br.23 (emphasis added); *see* Pet.Br.45 (arguing that the regulatory history "emphatically refutes this theory"); *see also* U.S.Br.24 (arguing that child safety concerns were absent from the 1989 rulemaking). That contention is seriously mistaken.

While NHTSA anticipated that the benefits of its Type 2 mandate for rear *outboard* seats would largely fall upon adults and older children, the most common occupants of rear *inboard* seats were younger children. *See* Jeya Padmanaban et al., *Kid in the Middle: A Discussion of Effectiveness of Center Rear-Seat Restraint Systems* 3 (2006), *available at* http://jpresearch.com/Docs/Final%20AAAM%202006.pdf (noting that "children 2-14" have the "highest occupancy rates" in rear center seats); Lawrence E. Decina et al., NHTSA, DOT HS 810 679, *Child Restraint Use Survey LATCH Use and Misuse* at 2,

35 (Dec. 2006) (noting that "the center-rear seat" is "the position long recommended to parents because of its distance from potential points of impact"). NHTSA was well-aware of this baseline when it entered into its 1989 rulemaking process. Throughout the 1980s, the agency itself had affirmatively encouraged parents to situate their young children in the rear center seat—which NHTSA touted as the "safest" position for a child. *See, e.g.*, 45 Fed. Reg. 81,625, 81,627 (Dec. 11, 1980); 50 Fed. Reg. 27,633, 27,636 (July 5, 1985).

Remarkably, both petitioners and the government ignore that NHTSA made clear—both before and during the 1989 rulemaking—that Type 2 belts were *unsafe* for this key group. *See, e.g.*, 45 Fed. Reg. at 81,627 ("[C]hildren in the age group 5-12 ... may be too short to use shoulder belts designed for adults."); 53 Fed. Reg. at 47,989 ("Many of these children are not yet big enough to use the shoulder belt in the rear seat, even when they slide as far inboard as possible, since it could pass over their neck or face."). Thus, NHTSA expressly directed that, if a child was in a seat with a Type 2 belt, "the shoulder belt should be routed behind the child, and the child should be protected *only by the lap belt*." 53 Fed. Reg. at 47,988 (emphasis added).[11]

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[11] NHTSA now warns parents that they should "**NEVER** put the shoulder belt under the child's arm or behind the child's back," as it can cause misplacement of the lap portion of the belt that in turn can cause "internal injuries in a crash." NHTSA, *Safety Tip #3: Traveling Safely With Preschool & School-Age Children* http://www.nhtsa.gov/people/injury/childps/newtips/pages/Tip3.htm (last visited Sept. 20, 2010); Matthew P. Reed et al., NHTSA, *Assessing Child Belt Fit, Volume 1: Effects of Vehicle Seat and Belt Geometry on Belt Fit for Children with and without Belt Positioning Booster Seats* at 57 (Sept. 2008), *available at* http://deepblue.lib.umich.edu/bitstream/2027.42/64459/1/102442.pdf.

In addition, most child restraints in 1989 (and for several years afterward) were compatible with lap-only belts, but could be used with lap/shoulder belts only with difficulty. *See* NHTSA, *Child Passenger Safety Resource Manual* 88 (Mar. 1992) (stating that the "center rear seating position," which almost always has a lap belt, "usually poses fewer compatibility problems [for child restraints]"); 56 Fed. Reg. at 3064 ("[T]he safest position for the child restraint (the center rear position) *will not be equipped with shoulder restraints.*") (emphasis added); Comments of Mercedes-Benz of North America, Inc., *Re: Notice 1, FMVSS "Occupant Crash Protection,"* NHTSA-87-08-N01-021 ("Due to the extremely low occupancy-rate of the rear-center seat by adults, plus an improved suitability for fastening child restraint systems, the rear-center seating positions are equipped with lap belts.").

Respondents argue that NHTSA believed that lap/shoulder belts would provide better protection for children when restrained in booster seats. Pet.Br.46. But they neglect to note that NHTSA specifically "acknowledge[d] that many parents do *not* use booster seats to protect their children." 53 Fed. Reg. at 47,988 (emphasis added). In fact, NHTSA's own 1994 research affirmed that only *0.8%* of children aged 6-12 sat in a child or booster seat, in contrast to the over 55% who sat in seatbelts—roughly half of whom sat in Type 2 belts, notwithstanding NHTSA's warnings. NASS Study at 6. In 1989, booster seat usage for children riding in vehicles was thus the *exception* rather than the rule.

Petitioners emphasize the agency's statement in 1988 that "*this proposal* for rear seat lap/shoulder belts would ... have no positive or negative effects on

children riding in most designs of car seats and children that are too small to use shoulder belts." 53 Fed. Reg. at 47,984 (emphasis added). But "this proposal" carved out *rear center seats*—the seats most likely to be occupied by younger children. Rather, NHTSA had concluded "that it should limit the proposed requirement for lap/shoulder belts in rear seats to *outboard* seating positions *only*." *Id.* at 47,984 (first emphasis added). Petitioners also gloss over the fact that NHTSA's predictions depended on the agency's view that parents could convert a Type 2 belt *back* into a make-shift Type 1 belt. *See id.* at 47,988.

Indeed, by 1994, NHTSA repudiated its views that Type 2 belts would enhance child safety in traditional booster seats. Instead, it determined that it "does not know of any shield-type booster seat that performs well ... with a lap/shoulder belt system" when the shoulder belt is "left in front of the child." 59 Fed. Reg. at 37,173. Likewise, it concluded that placing a Type 2 belt's shoulder component behind the child's head would *increase* the dangers of lap/shoulder belts for children. *See supra* at n.11. And in 2002, NHTSA abandoned reliance on Type 2 belts for child car seats altogether and instead adopted the LATCH system. *See* 64 Fed. Reg. at 10,788.

For similar reasons, the government's reliance on the agency's alleged failure to expressly "endorse the notion that child safety depended on the continued availability of Type 1 seatbelts," U.S.Br.26, is unpersuasive. Because the agency had already decided to preserve the status quo in rear center and aisle seats, 53 Fed. Reg. at 47,984, there was simply no need to set out at length the child safety benefits of *preserving* a Type 1 belt in those seats. Instead, and

understandably, NHTSA focused primarily on the safety consequences for an *outboard* Type 2 seat requirement. This argument is thus another way in which the government's (and petitioners') efforts to zero in on the 1989 rulemaking—with no appreciation for the *status quo* NHTSA preserved in 1989 for rear center/aisle seats—fundamentally skews the analysis.

Aisle Seat Safety

Importantly, the regulatory record also reflects that NHTSA had at least two safety and design concerns with use of Type 2 belts in the specific rear seat at issue here—the inboard *aisle* seat. First, using Type 2 belts in that position created "potential ingress/egress problems ... for those more rearward seats," because the shoulder strap usually had to stretch across the aisleway to be properly anchored. 69 Fed. Reg. at 70,905; *see* 55 Fed. Reg. at 30,915. And second, "attaching belt anchorages to the side of the vehicle could cause a lap/shoulder belt to fit its user poorly." 69 Fed. Reg. at 70,905. These problems persisted for some manufacturers for over a decade, finally leading NHTSA in 2004 to allow manufacturers to install detachable lap/shoulder belts for these seats, rather than integrated Type 2 belts. *Id.* at 70,909.

NHTSA "encourage[d]" manufacturers to find ways to address these problems and install Type 2 belts—"in those cases where manufacturers are able to design and install lap/shoulder belts at seating positions adjacent to aisleways *without interfering with the aisleway's purpose of allowing access to more rearward seating positions.*" 54 Fed. Reg. at 46,258 (emphasis added). But as NHTSA's own chief counsel confirmed, NHTSA concluded that manufacturers were in "the best position" to determine whether a

Type 2 belt could be designed and installed without such interference. 1994 Chief Counsel Letter, *supra*.[12]

Technical Challenges, Costs, Public Acceptance And Additional Safety Implications

NHTSA also recognized that a Type 2-belt *mandate* in rear center seats would force carmakers either to overcome costly technical challenges or to compromise safety or vehicle performance. As commenters pointed out during the 1989 rulemaking, because rear center seats were "not presently required to even have anchorages for shoulder belts," 53 Fed. Reg. at 47,984, a Type 2 mandate would have necessitated "structural changes ... [that could] result in disruptions of the vehicle's cargo carrying area or impede the driver's rearward vision," *id.* The agency found these technical concerns credible, "agree[ing] with those commenters

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[12] Different makes and models presented different challenges. For example, during the 1989 rulemaking Mazda told NHTSA that a "mandatory" Type 2-belt requirement for "rear center seating positions" would create "enormous complexities" and "cause the loss of the rear seat fold-down and package tray removal features currently provided on many models." Comments of Mazda (North America), Inc. Research & Development Center, *Re: Request for Comments—ANPRM—FMVSS 209 and 210, Occupant Crash Protection and Seat Belt Assembly Anchorages*, 87-08-NOI-028 (July 28, 1987). Since those features were "absolutely necessary to facilitate cargo carrying, a major function of [multi-passenger vehicles]," Mazda also advised that "[t]he loss of these features will force Mazda to consider the elimination of the center rear seating position." *Id.* To be sure, not all vehicles presented such challenges. But in a competitive market, vehicle designs even within a particular class of cars can vary significantly—all of which underscores the wisdom of the agency's decision to leave to the manufacturer, for its vehicles, the determination of when the installation of Type 2 belts in rear aisle seats was feasible and appropriate. 1994 Chief Counsel Letter, *supra*.

that asserted that there would be more technical difficulties" from a requirement for Type 2 belts in rear center seats. *Id.* Even the American Seat Belt Council was hostile to such a requirement, finding that "lap/shoulder belts in rear center seating positions had low cost-effectiveness and little field testing." *Id.*

Ultimately, NHTSA concluded that "[w]hether or not those [technical] difficulties could be overcome, there would be small safety benefits and substantially greater costs if rear seating positions that are not outboard were required to have lap/shoulder belts." *Id.* at 47,984-85. NHTSA estimated that requiring Type 2 belts in rear center seats would cost $109 million in passenger cars and $42 million in MPVs and light trucks on an *annual*, industry-wide basis. In contrast, after studying almost 200,000 injuries to rear passengers, NHTSA concluded that requiring lap/shoulder belts in *all* rear seats "in light trucks and MPV's can reduce 55 moderate to serious injuries, but would bring about *no reduction in fatalities.*" 52 Fed. Reg. at 22,820 (emphasis added). NHTSA thus found the costs to be "extremely disproportionate to the possible safety benefits." *Id.* at 22,819-20.

This was significant, because NHTSA's experiences had taught it that low-benefit, high-cost mandatory rules generally led to a public backlash and problems with public acceptance, which had previously proven detrimental to its safety objectives. *See* 46 Fed. Reg. at 53,424; 49 Fed. Reg. 28,962, 28,996-97 (July 17, 1984); *see also Geier*, 529 U.S. at 878 (giving industry time to overcome "safety problems and ... high production costs" builds public confidence and acceptance).

After "examining the cost-effectiveness of several existing passenger car crashworthiness standards," the

agency also found that the other standards were "from 20 to 160 times more cost-effective" than would be a rear seat lap/shoulder belt requirement. 52 Fed. Reg. at 22,819. Of course, after learning that 99.4% of all cars would have lap/shoulder belts in rear outboard seats anyway, the agency determined that the cost of mandating Type 2 belts in rear *outboard* seats was more manageable, only $790,000 for passenger cars. 53 Fed. Reg. at 47,991; 54 Fed. Reg. at 25,276. The cost of requiring Type 2 belts rear center and aisle seats, in contrast, remained orders of magnitude greater.

C. Tort Suits Like This One Would Frustrate Accomplishment Of The Policies Embodied By FMVSS 208

1. After considering these factors, NHTSA required Type 2 belts in rear *outboard* seats—which did not present the same safety concerns involving children, raised few technical problems, and could be installed at a fraction of the cost—but deliberately left manufacturers "free to choose" (U.S.Br.8) Type 1 or Type 2 belts in rear center and aisle seats. That determination—which is embodied in FMVSS 208—reflected NHTSA's considered judgment about the safety, technical feasibility, costs, and benefits of Type 1 versus Type 2 belts for rear center and aisle seats, shaped by years of rulemaking proceedings, hundreds of industry and consumer comments, and institutional expertise. Allowing petitioners' state tort claims to proceed would require juries to weigh the same factors and leave juries free to impose the very rule that the expert agency rejected in 1984, and again in 1989.[13]

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[13] California law, for example, provides that, "in evaluating the adequacy of a product's design," a jury may consider factors such

That tort law regime would frustrate the policy judgment embodied in FMVSS 208 that granting manufacturers the option of installing a Type 1 or Type 2 belt was the appropriate way to best promote the objectives of the Safety Act, including safety. *See* U.S. *Wood* Br.6-7, 14-15 (explaining how tort regime would frustrate NHTSA policy regarding airbags); *see also Hurley*, 222 F.3d at 382 ("The point is that, as in *Geier*, the decision to leave options open to .... manufacturers was made with specific policy objectives in mind. Hurley's suit, if successful, would undermine that policy objective ...."). For example, a state rule mandating Type 2 belts in rear center/aisle seats would create added safety concerns for many children (*e.g.*, those who were not properly seated in a booster); create unique vehicle safety risks to other passengers (*e.g.*, those in the back row) if Type 2 belts were not installed without significant structural changes to vehicles; force manufacturers to make enormously costly changes with at best marginal safety gains; and invite the public backlash that is often sparked by mandating an overly costly design requirement.

As in *Geier*, this conclusion is particularly stark given that the agency specifically *refused* to adopt the "all Type 2-belt rule" that petitioners now seek to impose through state tort law in acting on petitions that would have required the installation of Type 2 belts in rear seats. *See* 529 U.S. at 879; *see also* U.S.

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as "the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 455 (Cal. 1978). California is by no means unique in the factors it asks juries to weigh in such suits.

Wood Br.15 ("What distinguishes this issue from most is that the Secretary determined not simply to allow either automatic belts or airbags, but that an all airbag rule would *disserve* the *safety* purposes of the Act."). The government says that NHTSA "did not 'consider and reject' any imposition of a higher safety standard." U.S.Br.19-20 (quoting *Wyeth*, 129 S. Ct. at 1203 n.14). But in 1989, NHTSA unquestionably *did* reject imposition of a Type 2-belt requirement for rear center/aisle seats—a "higher" standard, in the government's view. Indeed, NHTSA "modified" the proposed rule in 1989 to *eliminate* such a requirement for rear aisle seats. 54 Fed. Reg. at 46,258.

Pointing to *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), petitioners argue that NHTSA's refusal in 1984—and again in 1989—*not* to impose the same "all Type-2 belt requirement" that they now seek to impose through state tort law is irrelevant. Pet.Br.42-43. But *Sprietsma* dealt with the quite different situation in which the federal agency had decided not to regulate *at all* in the pertinent area (propeller guards). 537 U.S. at 54. Here, as in *Geier*, the agency's refusal to impose the regulatory requirement at issue arose in the context of a comprehensive federal program that already regulated the precise equipment at issue. *See* U.S. *Sprietsma* Br.19 ("*Geier* considered the preemptive effect, not of an agency's failure to regulate, but of an existing federal safety standard that addressed in some detail the subject of motor vehicle passive restraint devices."). Moreover, an agency's decision not to regulate in an area is a far cry from a decision to retain an existing rule (as NHTSA did for rear center and aisle seats). Accordingly, this case—

like *Geier*—stands in "sharp contrast" to *Sprietsma*. 537 U.S. at 67; *see also Carden*, 509 F.3d at 232.[14]

2. Petitioners argue that the rule at issue cannot be preemptive because the FMVSSs are generally defined as "minimum" standards. Pet.Br.27-28. The plaintiffs and the dissent in *Geier* made the same argument about the passive restraint options under FMVSS 208. 529 U.S. at 874. And the *Geier* majority rejected that argument, holding that while most FMVSS requirements may establish only a floor, some grant manufacturers options that are protected by preemptive federal law. *Id.* at 874-75. *Geier* thus resolves that a FMVSS can serve as more than just a minimum federal standard in order to achieve policy objectives of the Act—and have preemptive effect.

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[14] There also are important differences between the statutory regimes in *Sprietsma* and in this case. The Federal Boat Safety Act of 1971 provides that the Coast Guard *may* prescribe "minimum safety standards," but only after consulting with an advisory council and considering various criteria including existing "recreational vessel safety standards" and "the need for and the extent to which the regulations will contribute to recreational vehicle safety." *Sprietsma*, 537 U.S. at 57-58 (citing 46 U.S.C. §§ 4302, 13110). In the Coast Guard's view, that "regulatory process is very structured and stringent regarding justification," such that the appropriate response to uncertainty was to refrain from regulation. *Id.* at 66. The Coast Guard had already made clear that when it *did not* issue a federal standard it always intended to leave state law undisturbed. *See id.* at 59-60. This Court recognized that "the Coast Guard's entire explanation for its decision ... reveals only a judgment that the available data did not meet [its] 'stringent' criteria for federal regulation," and *did not* represent a "deci[sion] that, as a matter of policy, the States and their political subdivisions should not impose some version of propeller guard regulation." *Id.* at 66-67.

The government suggests that FMVSS 208 just sets a "minimum" federal standard of "at least" a Type 1 belt. U.S.Br.9. But that is certainly not what the regulation says. And if NHTSA had wanted to establish a Type 1 belt minimum, then the reference to Type 2 belts in the regulation is pure surplusage, *cf. Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (expressing "deep reluctance" to interpret statutory provisions "so as to render superfluous other provisions in the same enactment"). The fact that NHTSA explicitly gave manufacturers the option of installing a Type 1 or Type 2 belt in the seating positions at issue strongly suggests that the agency had a different kind of rule in mind than a simple minimum standard such as the federal standard for roof strength, 49 C.F.R. § 571.216, or anti-lock brakes, *id.* § 571.105. And of course, critically, as in *Geier*, the regulatory history confirms just that.

Moreover, the government is wrong to assume that a Type 2 belt is necessarily more protective than a Type 1 belt, as its attempt at formulating a "minimum" standard implies. For example, as discussed, Type 2 belts posed unique safety risks for children—who are most likely to be seated in rear center seats—and women.[15] Installation of Type 2 belts in the rear aisle

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[15] *See, e.g.*, James M. Lynch et al., *Direct Injury to the Cervical Spine of a Child by a Lap-Shoulder Belt Resulting in Quadriplegia. Case Report*, 41 J. Trauma, Injury, Infection, & Critical Care 747, 749 (1996) (noting case where six-year-old child suffered spinal injury due to "shoulder component of a lap-shoulder seat belt [which] resulted in quadriplegia" and concluding that "[t]his case demonstrates that built in three-point restraint devices, designed for the 'smallest' adult, may have inherent injury potential to the in-between-aged child"); *Tran v. Toyota Motor Corp.*, 420 F.3d 1310, 1312 (11th Cir. 2005) (small-statured

seat also posed unique risks to passengers in the back row. *Supra* at 33. Under petitioners' position, a manufacturer thus might be subject to one state tort action for failing to install a Type 2 belt (as here) and another for failing to install a *Type 1* belt, such as where a child was injured by a shoulder belt, or a passenger in the back seat of a minivan who had difficulty exiting a vehicle after a crash, was injured. Especially in these circumstances, it makes perfect sense that the agency would grant manufacturers the option of installing either seatbelt type in these seats.

3. Petitioners and the government make much of NHTSA's statement in 1989 that it "encouraged" manufacturers to install Type 2 belts in rear aisle seats when feasible, and argue that allowing state tort actions like the instant one would actually advance that objective. Pet.Br.22; U.S.Br.17, 21, 28. The government goes further and suggests that NHTSA would have been perfectly happy if manufacturers had "*immediately* installed Type 2 seatbelts" in the seating positions at issue. U.S.Br.8 (emphasis added). There are several fundamental problems with this argument.

First, it ignores what NHTSA actually said. The pertinent passage did not "encourage" manufacturers to install Type 2 belts at all cost—and without regard to safety. 54 Fed. Reg. at 46,258. It "encouraged" manufacturers to do so only "in those cases where manufacturers are able to design and install lap/shoulder belts at seating positions adjacent to aisleways *without interfering with the aisleway's purpose of allowing access to more rearward seating positions.*" *Id.* (emphasis added). NHTSA's objectives

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woman claimed that vehicle's "shoulder belt improperly fit shorter passengers" and caused severe "spinal cord injury" in accident).

would have been frustrated if manufacturers had been forced "immediately" (U.S.Br.8) to install Type 2 belts in aisle seats before they could resolve the safety and technical issues that the agency had recognized.[16]

Second, encouraging *manufacturers* to install Type 2 belts in rear aisle seats as soon as they could resolve the safety and technical issues NHTSA had identified in its rulemaking is quite different than empowering lay juries to require the installation of Type 2 belts (via multimillion dollar damages awards) when *they* saw fit. Manufacturers occupied a unique vantage point to make that determination for their vehicles, especially given the variations among vehicle designs. And as late as 1994, NHTSA's own chief counsel made clear that, in NHTSA's view, the "*vehicle manufacturer* is in the best position" to decide when installation of Type 2 belts was safe and appropriate in those seats. 1994 Chief Counsel Letter, *supra* (emphasis added). That statement directly repudiates the government's suggestion that NHTSA would have been happy if juries had simply mandated Type 2 belts in those seats.

Third, *Geier* underscores that the fact that NHTSA "encourages" one option does not mean that it is indifferent to state tort claims effectively mandating that option. When NHTSA adopted the 1984 version of FMVSS 208 the general consensus was that airbags were a safer passive restraint than the other available

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[16] As the government acknowledges, U.S.Br.28, NHTSA was quite comfortable *requiring* lap/shoulder belts where it believed that identified technical challenges could be overcome. *Cf.* 53 Fed. Reg. at 47,986 (concluding "there may be some difficulties with installing rear lap/shoulder belts in some particular models" of MPVs, but mandating Type 2 belts anyways since "NHTSA has no reason to believe that these difficulties cannot be overcome").

options. 49 Fed. Reg. at 28,986. And NHTSA affirmatively "encourage[d]" manufacturers to install airbags in a much more concrete way than a line in the *Federal Register*: it gave manufacturers "a form of extra credit for airbag installation." 529 U.S. at 879; *see id.* at 891-92 (dissent). Nevertheless, this Court held that state tort claims that would effectively impose an "airbags only" rule were preempted. *Id.* at 886. The same conclusion follows here.

The plaintiffs and dissent made a similar argument in *Geier*, in suggesting that "as far as FMVSS 208 is concerned, the more airbags, and the sooner, the better." *Id.* at 874; *see* U.S.Br.14. But this Court rejected that argument in *Geier*, concluding that the agency had taken a different approach—by giving manufacturers the option to install different types of devices—in order to advance policy objectives of the Safety Act and thereby, for example, "lower costs," "overcome technical safety problems," and "win widespread consumer acceptance." 529 U.S. at 875. So too here. Indeed, that conclusion is even stronger. Everyone essentially agreed that "to be safe, a car must have an airbag." *Id.* at 886. Yet in 1989, and thereafter, serious questions existed as to whether Type 2 belts were in fact safer in rear center/aisle seats, especially for children and for passengers in the back row whose access could be impeded.

4. Petitioners and the government also seek artificially to narrow the policy considerations that this Court may consider in determining whether an actual conflict exists. Thus, for example, as discussed above, they misinterpret the administrative record on safety concerns and erroneously suggest that the Court should disregard anything that is not in the 1989

rulemaking. But they go even further when it comes to aisle seat safety and cost-benefit considerations.

First, the government defensively suggests (Br.20-21) that this Court should simply disregard the unique safety issues presented by Type 2 belts *in the very seat involved in this case*—the rear aisle seat where Thanh Williamson was sitting at the time of the accident, Pet.Br.16—on the theory that respondents have not adequately raised this point. But respondents specifically raised this argument below, Cal.App.Resps.Br.18 (discussing "[i]mpairment of ingress and egress for multipurpose passenger vehicles with aisles"), as well as at the certiorari stage, Supp.Br.7, and made clear in their opposition brief what seat was at issue, Opp.9. Moreover, respondents "may, of course, defend the judgment below on any ground which the law and the record permit." *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982). Thus, there is no reason for the Court to disregard this important piece of the administrative record—and the added safety concerns presented by the installation of Type 2 belts in rear aisle seats alone provides an adequate basis to conclude that lawsuits like this one seeking to mandate Type 2 belts in those seats are preempted.[17]

Second, petitioners and the government advance the broad proposition that cost-benefit considerations cannot justify federal preemption. Pet.Br.42; *see* U.S.Br.19. As petitioners acknowledge, however, "the Safety Act *requires* NHTSA 'to consider factors such as feasibility and cost in issuing motor vehicle safety

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[17] Of course, it is true that the fact that rear aisle seats present unique safety concerns narrows the issue before this Court. That was an appropriate reason to deny certiorari. Supp.Br.9. But it is no reason to disregard the case actually before the Court.

standards." Pet.Br.42; *see* 49 U.S.C. § 30111(a) (FMVSSs must be "practicable"). Cost-benefit considerations are just as legitimate a federal policy embodied in the Safety Act as safety, and this Court specifically credited the agency's cost-benefit consideration in *Geier*. 529 U.S. at 878; *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 54 (1983) ("The agency is correct to look at the costs as well as the benefits of Standard 208.").

Moreover, cost considerations are intertwined, in the long run, with NHTSA's safety mission—as this Court recognized in *Geier*. 529 U.S. at 875 ("FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance—*all of which would promote FMVSS 208's safety objectives.*") (emphasis added). The agency made clear in the rulemaking leading up to the agency's refusal to require manufacturers to install Type 2 belts in the seating positions at issue that "[r]equiring significant industry and agency resources to be spent for relatively little safety gain can result in a lost opportunity to better improve vehicle safety through other means, such as improved frontal or side impact protection." 52 Fed. Reg. at 22,819. It also recognized that cost considerations would heavily influence public acceptance. *See* 49 Fed. Reg. at 28,996-97; 46 Fed. Reg. at 53,424; *see also Geier*, 529 U.S. at 879 (giving industry time to overcome "safety problems and ... high production costs" builds public confidence).

This Court has refused to treat cost-benefit concerns as an illegitimate or second-class policy consideration even under statutes far less explicit about the role of cost-benefit analysis than the Safety

Act. *See, e.g., Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) (reaffirming EPA's authority to weigh costs against benefits under the Clean Water Act). In accordance with its statutory mandate, NHTSA properly took those considerations into account in refusing to require manufacturers to install Type 2 belts in rear center and aisle seats. And neither petitioners nor the government have provided any reason to disregard statutorily mandated cost-benefit considerations in gauging conflict preemption.[18]

5. Petitioners and the government also argue that preemption is off the table because "NHTSA was not seeking to encourage *variety* in seatbelt design or to foster a *mix* of Type 1 and Type 2 seatbelts." U.S.Br.17 (emphasis added); *see* Pet.Br.36. The premise of that argument is mistaken. When, as here, an agency creates an equipment option based on an express recognition that there are serious tradeoffs for designing a vehicle one way or the other, it invariably will foster a mix or variety of equipment designs as manufacturers exercise the option and compete in the marketplace. And that is what happened. Some manufacturers installed Type 2 belts in rear center/aisle seats while others installed Type 1 belts, and those that did install Type 2 belts in those seats solved the technical problems in different ways often depending on the vehicle type or configuration.

Moreover, in this context at least, variety is not an end to itself. In *Geier*, this Court noted that NHTSA

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[18] The government's reliance (Br. 23) on *Sprietsma* is misplaced. In *Sprietsma*, the Court did not say that cost-benefit considerations are irrelevant for conflict preemption; rather, the Court simply held that the agency decision at issue did not conflict with federal objectives. 537 U.S. at 67; *supra* at 38-39.

had concluded that "a mix of [passive restraint] devices" would, among other things, "allow the industry time to overcome the safety problems and high production costs associated with airbags" and "build public confidence" and acceptance. 529 U.S. at 879. As discussed above, NHTSA's decision to grant manufacturers the option of installing a Type 1 or Type 2 belt in rear center/aisle seats was intended to achieve the same ends, not to mention advance safety, by permitting manufacturers to strike the balance that made the most sense for their vehicles. *Supra* at 29-36.

In any event, for purposes of determining whether common law actions would stand as an obstacle to the accomplishment of federal law, there is nothing talismanic about an agency's effort to encourage a "variety or mix" of equipment types (Pet.Br.36). Rather, as the government recognizes, the key is whether the agency intended to leave manufacturers "free to choose" among options in order to advance policy objectives under federal law. U.S.Br.8. Indeed, it would be strange to say that the *only* time that an option can be preemptive under the Safety Act is when it is intended to foster a "variety or mix" of different equipment options, given that creating a "variety or mix" of options is not a federal objective under that Act but rather just a *means* of advancing policy considerations like safety and technical feasibility that *are* ends of the Safety Act. And nothing in *Geier* compels such an unusual preemption rule.[19]

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[19] Petitioners point out that in passing the 1989 amendments to FMVSS 208, NHTSA did not create a federalism assessment pursuant to Executive Order 12612. *See* 54 Fed. Reg. at 46,265-66; *id.* at 25,278. But that Order focused on the "effect" of new laws or regulations. 52 Fed. Reg. 41,685, 41,687-88 (Oct. 30, 1987).

D. The Government's Position Does Not Merit Deference

Petitioners rely heavily on the government's position that their tort claims are not preempted, and claim that this position is entitled to "special weight." Pet.Br.22, 32; *see* U.S.Br.29 ("considerable weight"). That is incorrect. This Court has held that the government's views are entitled –at most—to "some weight" in this context, and even that weight depends on the "thoroughness, consistency, and persuasiveness" of the government's position. *Wyeth*, 129 S. Ct. at 1201 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). For several reasons, the government's position in this case does not merit deference.

First, here, as in *Geier*, the regulatory history "is clear enough" that the government's view is beside the point. 529 U.S. at 886; *see also Wyeth*, 129 S. Ct. at 1203 (stating that the Court conducts its "own pre-emption analysis" and only then "consider[s] the agency's explanation of how state law interfere[s] with its regulation"). Moreover, on the regulatory record before the Court, this case is governed by *Geier*. And the government is of course not entitled to any deference when it comes to the proper interpretation of this Court's decisions. *See, e.g., Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 n.5 (2000).

Because state tort claims for failure to install Type 2 belts in rear center/aisle seats already were preempted before the 1989 regulation, the 1989 amendment (which maintained the status quo for those seats) had no further effect on state law for the agency to assess. Moreover, the absence of such an assessment hardly overcomes the significant evidence that a Type 2 mandate for rear center/aisle seats would actually conflict with federal objectives.

Second, the government's position is "inherently suspect." *Wyeth*, 129 S. Ct. at 1201. In *Geier* and two prior cases (*Wood* and *Freightliner*), the government mapped out its position that, when NHTSA "determines that certain activity must be permitted in order to further the purposes of federal law, state law that would forbid that behavior is preempted." U.S. *Geier* Br.26; *see supra* at 3. But the government then sat idle for nearly a decade as one court after another held that FMVSS 208 preempted state tort actions based on failure to install a Type 2 belt, given the policy objectives NHTSA sought to further by leaving manufacturers free to choose between Type 1 and Type 2 belts. NHTSA could have clarified its views by regulation, or at least filed an *amicus* brief in any of those cases, if it had thought them inconsistent with federal policy. It did not. The government's position in this case comes out of thin air.[20]

The natural conclusion—especially given the high-profile and high-stakes nature of this issue for the industry—is that the government believed those decisions were right then, and only recently changed its position on the preemptive effect of FMVSS 208. That conclusion is supported by the intervening issuance of the President's 2009 directive against preemption. 74 Fed. Reg. 24,693 (May 22, 2009). And

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[20] In *Geier*, this Court noted that the government had consistently taken the position that FMVSS 208 preempted state tort claims for failure to install an airbag. 529 U.S. at 883. This case, however, represents the first time the government has taken a position on FMVSS 208's preemptive effect in a rear seatbelt case, much less a rear aisle seatbelt case. As a result, the government's views are hardly entitled to weight on the basis of any "consistency" rationale. *Wyeth*, 129 S. Ct. at 1201.

indeed, petitioners' own *amici* argue that, after President Obama's election, "shifting political tides" ended NHTSA's preemption assertions. Public Justice Br.19. The Executive is, of course, free to change its views on the appropriate reach of federal law, but the agency's "newfound" and "recently adopted" positions "on state law are inherently suspect in light of this" purely political development. *Wyeth* 129 S. Ct. at 1203, 1204, 1201; *see also, e.g., Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 356 (2000).

Third, given the peculiar retrospective nature of the question presented—which focuses on the preemptive impact of a now defunct rule adopted more than a decade ago—the government is effectively seeking deference for its interpretation of a historical judgment made by NHTSA more than a decade ago. The government does not enjoy any institutional advantage in telling (or reconstructing) such history. And the government's brief represents scarcely more than a "*post hoc* rationalization[]" for agency action, which is not entitled to deference. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962).

Finally, the government's position is contradicted by the agency record and simply unpersuasive. For example, as discussed above, the government ignores NHTSA's recognition that Type 2 belts create particular dangers for children and that Type 1 belts worked better with most child restraint systems; the government erroneously suggests that this Court should categorically disregard the unique safety concerns presented by the installation of Type 2 belts in rear aisle seats, U.S.Br.20-21; the government wrongly claims that NHTSA would have been perfectly happy with a rule requiring manufacturers

immediately to install Type 2 belts in rear center/aisle seats and does not acknowledge the 1994 letter of NHTSA's chief counsel refuting that view, U.S.Br.8-10; *see also* U.S.Br.17-18; and the government mistakenly argues that a federal agency's policy judgment can never preempt state law if it rests on cost-benefit considerations, U.S.Br.8-9, 23.

Accordingly, as the Court concluded in *Wyeth* and *Shanklin*, the government's position is not entitled to deference—and cannot carry the day for petitioners.

III. CONGRESS DID NOT INTEND THE ARBITRARY REGULATORY REGIME ENVISIONED BY PETITIONERS

The Congress that passed the Safety Act could not possibly have intended the arbitrary and penal regulatory regime envisioned by petitioners and the government—in which manufacturers could invest millions in designing their vehicles based on a federal rule that explicitly gave them the option of using specific equipment types, for particular policy reasons under the Act, only to find out years later that they could be hit with massive tort liability in state court for installing one of those very types. *See supra* at n.12 (example of the type of fundamental structural changes that a Type 2 mandate could trigger for a vehicle).

In passing the Safety Act, Congress appreciated that "[t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry" presented unique concerns. S. Rep. No. 89-1301, at 12, 1966 U.S.C.C.A.N. at 2720. As this Court explained in *Geier*, the Act preserves state tort lawsuits that are consistent with federal safety standards. But the Court made equally clear that state tort actions that conflict with the federal standards promulgated under

the Safety Act are preempted. And it is vitally important for the industry to be able to rely on the supremacy of federal law in making the investment decisions necessary to design and make vehicles in a "centralized, mass production" fashion.

There are plenty of important policy reasons that NHTSA might want manufacturers to have design choices in a particular area—including a recognition that there were safety tradeoffs, cost-benefit considerations and public acceptance concerns, and a determination that manufacturers are in a better position than anyone else to balance various tradeoffs in light of a particular vehicle's design and likely passenger mix. State tort actions eliminating such choices can directly frustrate those federal objectives—and prove "counterproductive." U.S.Br.10.

Petitioners' position would put manufacturers in an impossible situation. NHTSA studied the various tradeoffs between Type 1 and Type 2 seatbelts for decades, gave manufacturers the option of installing one or the other in rear center and aisle seats, and specifically refused to require manufacturers to install Type 2 belts in those seats—twice. Manufacturers have to build cars for the U.S. market as a whole, and naturally believe that they can rely on NHTSA's seemingly authoritative resolution of contentious safety issues involving difficult tradeoffs—especially when, as here, they are spelled out in a FMVSS.

According to the government, there are more than one million cars on the road "equipped with some Type 1 seatbelts, any one of which could potentially become the subject of a tort suit like this one." U.S. Invitation Br.19. If this lawsuit is not preempted, then presumably neither is a lawsuit predicated on the

premise that *Type 1* belts should have been mandated. After all, NHTSA was still receiving regulatory proposals that it ban Type 2 belts from aisle seating locations because of ingress/egress concerns in 1994. So petitioners' rule would put manufacturers in a "damned if you do, damned if you don't" predicament.

To make matters worse, petitioners and their *amici* offer manufacturers (and courts) no clear principle to discern when preemption stops or starts. As discussed, they appear to argue that petitioners' lawsuit became un-preempted at some point before 1993—not because of anything NHTSA *did*, but because of purported technological developments that NHTSA itself had not evaluated. That approach to preemption raises serious due process concerns, *see Chrysler*, 158 F.3d 1350, and is entirely too fickle and capricious to provide the certainty needed to design and mass produce a vehicle.

In the decade since *Geier*, the lower courts have uniformly recognized that state lawsuits premised on a supposed duty to install Type 2 belts in all rear seats are inconsistent with the choice NHTSA deliberately gave manufacturers in FMVSS 208. The industry has relied on *Geier* and this judicial consensus in making numerous difficult design decisions. There is no reason for this Court to upset the apple cart now. And doing so would only expose the nation's automobile industry to massive, unpredictable, and unfair retroactive liability for decisions made based on an express federal standard that was intended to leave manufacturers "free to choose among ... options." U.S.Br.8.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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September 21, 2010